

John T. Scott, III
Vice President &
Deputy General Counsel
Regulatory Law



Verizon Wireless
1300 I Street, NW
Suite 400 West
Washington, DC 20005

Phone 202 589-3760
Fax 202 589-3750
john.scott@verizonwireless.com

March 31, 2011

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

**Re: Reexamination of Roaming Obligations of Commercial Mobile Radio
Service Providers, WT Docket No. 05-265**

Dear Ms. Dortch:

In order to impose new roaming regulation on the wireless industry, the Commission's and the Administration's own policies compel the FCC to have a factual record demonstrating the need for doing so, and the Commission must also show it has the statutory authority to act. This letter addresses three distinct points:

- Recent statements and filings by proponents of data roaming show that they are vigorously competing and offering extensive roaming coverage – without a rule. Roaming agreements have been and continue to be negotiated, undercutting any factual predicate for regulation.
- Proponents have also made clear in recent filings that what they want is Commission oversight of the rates and terms of data roaming agreements. But oversight of rates and terms is classic common carriage regulation – which the law does not permit for wireless data services.
- Regulating nascent 4G services such as LTE is particularly unwarranted, as is regulation of any new technology. Crafting language in a rule or order that addresses LTE, for example, would ignore the reality that considerable technical work needs to be done over the next few years by the industry to ensure networks are technically compatible and to decide numerous questions as to how roaming will function. Regulation also cannot be squared with the Commission's and the Administration's goals for investment in 4G services.

Recent Developments Show That A Data Roaming Requirement Is Unnecessary.

The record already shows that some of the same carriers that are demanding that the Commission regulate roaming as somehow “necessary” for them to compete are simultaneously touting their growing competitive success – and have specifically noted their ability to secure roaming as evidence of that competitive success. Proponents of regulation cannot have it both ways. They cannot tout their competitive success to investors and the public, while pleading for Government assistance through rules regulating commercial agreements with their competitors.¹

Recent statements of one leading advocate for roaming regulation supply still more evidence undercutting any factual basis for the Commission to intervene into the market through new regulation. In November 2010, MetroPCS announced that its subscribers would now be able to use their MetroPCS service in areas covering more than 90 percent of the U.S. population. “MetroPCS customers can begin to enjoy unlimited talk, text, and Web services wherever they go in the nation on their existing MetroPCS service plan.”² At a March 7, 2011, investors conference, MetroPCS’s Chief Financial Officer emphasized how obtaining broad roaming coverage enabled it to “take increasing market share”:

“We cover a little under 100 million POPs at this point in the US, although all of our service plans include a nationwide footprint. That was a new development back in November of last year that we are very excited about that really puts us on par from a footprint standpoint on a combined network that is actually a tad bit larger than the Sprint network, over 280 million people in the US.” [The CFO] stated, further, “What this does for us is potentially grows the pie and allows us to take increasing market share. We’ve talked about on the last couple of calls that a third of the gross additions that we are seeing are coming from the low end of the traditional contract carrier post-pay plans. And by having, really, parity from a footprint standpoint with some of the large national competitors, we think that that’s going to help with gaining some incremental market share going forward into 2011 on. So we are very excited about this.”³

¹ Verizon Wireless Comments, WT Docket 05-265, filed June 14, 2010, at 7-9; Verizon Wireless Reply Comments, WT Docket No. 05-265, filed July 12, 2010, at 10-17; November 5, 2010 Letter from Verizon to Marlene H. Dortch, Secretary, FCC (“November 5 Letter”); January 18, 2010 from Verizon to Marlene H. Dortch, Secretary, FCC (“January 18 Letter”).

² MetroPCS Communications, Inc. News Release, “MetroPCS to Launch Metro USA Nationwide Coverage,” November 4, 2010, available at: <http://www.metropcs.com/presscenter/articles/mpcs-news-nationwide-20101104.aspx>.

³ Final Transcript, MetroPCS Communications, Inc. at Raymond James Institutional Investors Conference, March 7, 2011, at 1, 3.

Another leading advocate for Commission regulation recently underscored why regulation lacks factual justification. On March 22, 2011, Leap Wireless announced that it had entered into a long-term LTE roaming agreement with LightSquared. Leap's President and Chief Executive Officer stated, "This new roaming arrangement will allow us to offer customers an even-greater 4G service area as LightSquared expands its own network. We believe that the broad coverage resulting from this business agreement will enhance our ability to offer compelling products and services and allow us strengthen our retail relationships and distribution capabilities."⁴

The market success and public statements of MetroPCS and Leap undermine the predicate for new regulation. The record with regard to smaller carriers also does not provide that predicate, because they have not supplied the data on which the Commission could make a "data driven" evaluation to support a rule.

One recent example is telling: ACS Wireless recently changed its position to indicate it now supports a data roaming mandate.⁵ Significantly, ACS Wireless does not recant or even acknowledge its previous statements to the Commission that it has EvDO roaming arrangements in place with national wireless service providers in the U.S. and Canada and that "it has not felt disadvantaged in the least in entering commercial roaming relationships in the last several years. It has never been refused an agreement where the arrangement was technically feasible."⁶

Thus, the facts in the record as to ACS Wireless would undercut a roaming rule. In changing its position, ACS Wireless cites to carrier experiences set forth in a letter filed last November by RCA and RTG. In that letter, RCA and RTG submitted a handful of random, anecdotal accounts of conduct they claim to be anticompetitive.⁷ Based on these unverified and, in some instances, anonymous, accounts, these entities urged the Commission to regulate roaming. In contrast to these vague claims, Verizon Wireless supplied the Commission with data showing that Verizon Wireless has negotiated numerous domestic data roaming agreements with RCA member companies.⁸ Indeed,

⁴ Leap Wireless, Inc. Press Release, "Cricket Enters into 4G Roaming Agreement with LightSquared," March 22, 2011, available at: <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1541451&highlight=>.

⁵ Letter from Leonard Steinberg and Elisabeth H. Ross, ACS Wireless, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, March 22, 2011.

⁶ ACS Wireless Comments, WT Docket No. 05-265, filed June 14, 2010 at 6-7.

⁷ Letter from Rebecca Murphy Thompson, RCA, and Caressa D. Bennet, RTG, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed November 12, 2010 ("RCA/RTG Letter").

⁸ See, Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed January 18, 2011 (stating that Verizon Wireless has 47 active roaming partners that are RCA members, and has data roaming agreements with 85

the two examples RCA claims show anticompetitive behavior by Verizon Wireless⁹ are old and out-of-date, and both were previously addressed in Verizon Wireless' 2010 Reply Comments.¹⁰ No specific carrier has identified any current issue with Verizon Wireless.¹¹

Proponents Are Not Seeking a Data Roaming Obligation but Rather Regulation of Data Roaming Rates and Terms, Which The Commission Cannot Do.

It is obvious from a review of recent filings that what is on the table is whether the Commission can, and should, intervene to oversee the rates and terms of roaming agreements. Proponents of data roaming regulation have made it quite clear that a mere "duty to negotiate" is insufficient. They demand that the commission ensure that "rates, terms and conditions" are "just, reasonable and non-discriminatory" – the hallmarks of common carrier regulation:

- *Cricket Communications and Leap Wireless Ex Parte*, WT Docket 05-265, at 2 (Feb. 18, 2011) ("Cricket remains concerned that, absent a regulatory framework requiring automatic data roaming on fair, reasonable and non-discriminatory terms, it will be difficult to preserve or negotiate additional data roaming agreements, particularly for 4G.")
- *Sprint Ex Parte*, WT Docket 05-265, at 1 (Feb. 10, 2011) ("Sprint emphasized the importance of an automatic data roaming obligation, including an obligation to provide services at just and reasonable rates, terms and conditions.")
- *Sprint Ex Parte*, WT Docket 05-265, at 3-4 (Feb. 7, 2011) ("Sprint reiterates that any data roaming obligation the Commission adopts must include a standard

percent of the RCA member roaming partners that have actively sought data roaming agreements, almost 70 percent of which are for EVDO roaming).

⁹ RCA/RTG Letter at 1-2.

¹⁰ Verizon Wireless 2010 Reply Comments at 14. In addition, Bend Cable Communications filed a letter stating "we have been unable to secure data-only roaming agreements with the national providers." Letter from Amy C. Tykeson, Bend Cable Communications to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed November 16, 2010. Verizon Wireless has not been contacted by Bend Cable regarding a data roaming agreement.

¹¹ Other examples cited by RTG are similarly incorrect. RCA/RTG Letter at 2-3. It claims that Copper Valley Wireless was "denied" data roaming, but in fact Copper Valley refused (in contrast to other roaming partners) to provide redundant trunking, an essential network component designed to ensure reliable service for both parties' customers. It also claims that SRT Communications was given a "non-negotiable" price. To the contrary, the terms that were communicated to SRT over a year ago, were subject to negotiation, and Verizon Wireless has attempted to continue discussions with SRT towards reaching an agreement, to no avail.

requiring just and reasonable rates and not unreasonably discriminatory terms coupled with a robust FCC mechanism to enforce it.... Furthermore, it is imperative that the Commission give providers the right to invoke FCC enforcement mechanisms if they believe the just and reasonable rates and not unreasonably discriminatory terms standard has not been satisfied.”)

- *Bright House Networks Ex Parte*, WT Docket 05-265, at 8 (Jan. 11, 2011) (“BHN believes that the FCC has ample authority to establish a backstop rule requiring reasonable wholesale data roaming rates as part of its authority to authorize wireless data services.... Operators of broadcast, cable, and OVS facilities, as well as parties that interact with these entities, are subject to a host of ‘reasonableness’ requirements relating to prices, terms, and conditions No resort to Title II was necessary to enact these regulations. Nor is such the case with wholesale data roaming services.”)
- *SouthernLINC Wireless Ex Parte*, WT Docket 05-265, at 3 (Nov. 30, 2010) (“The significant economic benefits of making data roaming available to all wireless consumers throughout the United States on reasonable rates, terms, and conditions are not limited to the communications, technology, and infrastructure sectors, but extend throughout the US economy.”)
- *MetroPCS Ex Parte*, WT Docket 05-265, at 14 (Nov. 22, 2010) (“In sum, in order to promote the goals of the National Broadband Plan, increase the build-out of 4G services and enhance the available competitive choices for consumers, the Commission should act as soon as possible to adopt automatic data roaming obligations on a just, reasonable and non-discriminatory rate basis.”)
- *Rural Cellular Association Ex Parte*, WT Docket 05-265, at 4 (Nov. 12, 2010) (“In sum, these examples prove that rural and regional carriers simply are not in a position to obtain data roaming agreements with reasonable terms and rates from AT&T and Verizon Wireless in the absence of a data roaming mandate. ”)
- *T-Mobile Ex Parte*, WT Docket 05-265, Attachment at 6 (Nov. 2, 2010) (“Absent Commission oversight, data roaming will not be provided at reasonable rate, terms and conditions, diminishing competition.”)

The Commission cannot provide the oversight proponents of regulation seek without directly violating the provisions of the Act which prohibit the imposition of common carriage requirements on wireless data services. Any such oversight would place the Commission in the position of reviewing, approving and/or rejecting particular rates and other terms and conditions in the face of a dispute. It would also impose the most significant common carrier regulation on any broadband service to date. As Verizon Wireless has previously shown, whether wireless broadband Internet service is

provided directly to mobile subscribers or via a roaming arrangement, the offering is not a telecommunications service, and thus common carrier price regulation cannot apply.¹²

More recently, Public Knowledge (“PK”) argues that the Commission may impose common carrier regulation on data roaming on the theory that data roaming is provided “*in connection with*” a common carrier service subject to Section 201(b) of the Communications Act (“Act”).¹³ PK’s argument has no merit. PK concedes that data roaming is a “non-common carrier service[],”¹⁴ and its expansive reading of Section 201(b) is thus precluded by two statutory provisions that prohibit the Commission from imposing common carrier obligations on the provision of commercial mobile data services.

First, as Verizon Wireless previously demonstrated,¹⁵ data roaming is a private mobile service rather than a commercial mobile service (or its functional equivalent), and Section 332(c)(2) of the Act affirmatively forbids common carrier regulation of such service. Second, because data roaming is not a telecommunications service, Section 153(51) of the Act, which permits a carrier to be “treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services,” bars the Commission from imposing common carrier obligations on CMRS carriers’ provision of that non-common carrier service.¹⁶ PK cites no authority for the proposition that the phrase “in connection with” in Section 201(b) somehow trumps these express statutory limitations on the Commission’s authority. PK’s argument also fails in its attempt to draw an analogy to consumer contracts.”¹⁷ There is no basis to assert that a host carrier’s non-common carrier data roaming service is provided “in connection with” services that the home carrier provides directly to its own subscribers under an entirely separate service arrangement. PK’s argument accordingly must be rejected.

Simply put, the Act prohibits common carrier “rates and terms” regulation of data roaming service. Yet this is precisely what proponents of roaming regulation seek. Since the Commission cannot grant the oversight of roaming rates, terms and conditions that

¹² See Letter from John T. Scott, Vice President & Deputy General Counsel, Regulatory Law, Verizon Wireless to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (Nov. 8, 2010) (“Verizon *Ex Parte*”); Letter from John T. Scott, Vice President & Deputy General Counsel, Regulatory Law, Verizon Wireless to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (Mar. 30, 2011).

¹³ Letter from Harold Feld, Legal Director, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, at 1 (Feb. 22, 2011) (“PK Letter”) (quoting 47 U.S.C. § 201(b) (emphasis in original)).

¹⁴ *Id.*

¹⁵ See Verizon *Ex Parte*.

¹⁶ 47 U.S.C. § 153(51).

¹⁷ PK Letter at 1.

roaming proponents request while complying with the provisions of the Act, it should not adopt the proposed rule.

Regulating LTE Data Roaming Would Be Particularly Unjustified.

With respect to LTE data roaming, past experience with 2G and 3G data roaming has shown that market forces will work to ensure that LTE data roaming agreements will be available.¹⁸ Verizon Wireless has also entered into several agreements to provide nationwide LTE data roaming with participants in its LTE in Rural America program.¹⁹

Verizon Wireless has previously shown why it is both harmful and premature to require data roaming on nascent LTE networks.²⁰ The company previously noted that standards work necessary to enable LTE data roaming was not yet complete. While those standards are now in place, significant work remains to implement them before carriers will be able to implement LTE data roaming.

It is important to keep in mind that roaming is not technically feasible unless and until both roaming partners make the necessary investments in LTE technology and ensure that their networks can exchange data seamlessly for customers. With each successive wireless technology, inter-carrier roaming “handoffs” present unique technical issues. LTE is no exception. With LTE, not only do carriers need to make considerable investments, but precisely how they will design their roaming capabilities to ensure inter-network compatibility remains unsettled. Considerable work needs to be done by and then among carriers, including:

- Implementing network capabilities, including a Diameter Routing Agent/Diameter Proxy, which provides the connection between networks necessary to authenticate roaming subscribers.
- Establishing new contractual relationships with and connections to third party IPX or Hub providers needed to exchange traffic with other carriers.
- Software on existing systems needs to be added or upgraded that will enable carriers to differentiate roaming subscribers from home subscribers and route traffic to other networks, to enable billing in a new LTE record format, and to update fraud detection systems to support a new record format and comply with GSMA fraud timelines for sending records.
- Developing devices capable of roaming on other carrier spectrum bands.

¹⁸ Verizon Wireless Comments at 16-18; Verizon Wireless Reply Comments at 10-17.

¹⁹ November 5 Letter.

²⁰ Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed November 23, 2010.

This work is only just beginning. Many wireless carriers are likely several years away from being able to make the needed investments not only to offer LTE to their own customers, but to be able to service LTE traffic coming from other carriers' customers.

Grafting new regulation onto nascent technology is always problematic. It is particularly unjustified here since there is no record evidence that wireless carriers will not eventually and cooperatively negotiate LTE roaming agreements. An LTE roaming mandate would, worse, suffer the same evils that any regulation of new technology brings: it inevitably deters and skews investment and distorts the market in ways that no regulator can foresee.

One example of these technical uncertainties – uncertainties that counsel against regulation – is that one of the concepts the FCC may adopt is allowing carriers to limit data roaming to subscribers that live in particular markets as a means of preserving incentives for the requesting carrier to engage in 4G broadband investment. Thus if carrier A had implemented LTE in New York, but not in Chicago, then carrier B would be required to offer LTE data roaming to carrier A's New York subscribers, but not its Chicago subscribers. Presumably, this concept would avoid using roaming as a means of obtaining forced resale and would preserve some incentives for requesting carriers to implement new technologies in their home markets rather than rely on other carrier networks.

Such a concept, however, clearly does not account for the realities of how EvDO and LTE data roaming have been and will be provided. Carriers have only a limited ability to make EvDO data roaming available only to subscribers residing in areas where the requesting carrier has implemented EvDO, and no ability to limit LTE to LTE data roaming in this manner. With respect to EvDO data roaming, when a roaming subscriber initiates a data session on a roaming partner network, the data session request is transmitted to a packet data service node (PDSN) or Foreign Agent (FA) on the network for authentication. Among the information transmitted from the device to the PDSN or FA is the subscriber's area code. Accordingly, using the example above, if carrier A has not implemented EvDO in Chicago, it is possible to create tables that instruct the PDSN or FA not to authorize an EvDO data session for carrier A's subscribers from Chicago, but this capability becomes more complex, and will ultimately fail, as the number of markets loaded into the tables grows.

With LTE data roaming, the flaw in the concept of tailoring roaming rights to avoid discouraging wireless 4G buildout is even more acute. In LTE roaming, the authentication request will identify the subscriber by the International Mobile Subscriber Identity (IMSI), which is on the customer's SIM card. The IMSI is a 15 digit number that identifies a unique subscriber, and there is a six digit code within the IMSI that identifies subscriber's carrier and country. The IMSI, however, contains no geographical information beyond the country, so the serving carrier cannot identify the subscriber's home market and cannot restrict the availability of LTE roaming based on the requesting carrier's LTE implementation in that market. The only geographic targeting option

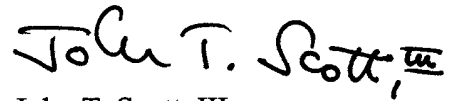
available to carriers for LTE data roaming is to block all of a carrier's subscribers from roaming in a particular market entirely. Thus, in the above example, carrier B could not restrict only some of carrier A's subscribers from roaming in Chicago.

For these reasons, it would be particularly unwise as well as improper for the Commission to mandate that carriers must negotiate LTE roaming agreements.

* * *

For the reasons discussed above and in Verizon Wireless's prior submissions in this docket, the Commission lacks the requisite factual and legal bases to impose an automatic data roaming rule. This letter is submitted pursuant to section 1.1206 of the Commission's rules. Should you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive, slightly stylized font. The "III" is written as a small, distinct mark at the end of the name.

John T. Scott, III

cc: Rick Kaplan
Angela Giancarlo
John Giusti
Charles Mathias
Louis Peraertz
Austin Schlick
Ruth Milkman
James Schlichting